No. 14498

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

LaVERL JOHNSON and JOLEEN JOHNSON,
Husband and Wife, and PACIFIC FRUIT EXPRESS
COMPANY, a Corporation,

Appellees.

Reply Brief of Appellant

UNION PACIFIC RAILROAD COMPANY

Appeal from the United States District Court for the District of Idaho, Eastern Division

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GATEWAY PRINTERS – POCATELLO

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STATEMENT OF FACTS

While we have captioned this as Statement of Facts it is merely a reply to appellees' Statement of Facts, because we believe that appellees are endeavoring to claim more for the facts asserted by them than the record really supports.

Appellees contend that the Pacific Fruit Express Company, prior to November 4, 1950 had no electricians employed at Pocatello. This should be corrected to show that they did have an electrician prior to and on November 4, 1950, Melvin Judge was its electrician (R 307).

It is questionable, in fact we think the testimony will not support a statement, that a Union Pacific electrician had been

in the substation on November 4, 1950 prior to the accident. We think there is no substantial evidence to support this, but to the contrary the evidence, we think, is clear that there were no railroad electricians and no one from the Railroad at all at the substation on the morning in question. See the testimony of James E. Johnson and Melvin Judge, who were in the substation performing whatever work was necessary to be performed (R 303-304, 308,309). The only reason appellees witnesses testified about a railroad electrician is because they said they saw Union Pacific trucks around the substation (R 122). That doesn't prove there were railroad electricians in the substation, for the trucks they saw might have been railroad trucks parked there for some other purpose, because the substation itself sets out in the open and does not preclude the parking of vehicles about it (R 123-124, 284).

Neither does the record support the statement that employees of the Pacific Fruit Express Company had been in the past assigned to work in the substation "for the purpose of painting lead wires" as stated on pages 5-6 of appellees Brief. The record only shows that that was what LaVerl Johnson was instructed to do on the day he received his injury (R 108).

Contrary to appellees statement of facts, there was a hot stick available to pull the disconnect switches (R 286).

Reference is made to the fact that there were no warning signs in the substation about pulling switches; but if that is of any importance, and we think it isn't, appellee LaVerl

Johnson testified that he paid no attention to any switches when he went in (R 228) ; so if he didn't look at the switches he wouldn't have seen any signs either.

Appellees endeavor to support their case by a statement that the appellant was furnishing electricity to the Pacific Fruit Express for a valuable consideration. There are some statements in the evidence about the furnishing of electricity to the Pacific Fruit Express Company, but nothing about a valuable consideration. There is nothing substantial to support any statement that appellant was furnishing electricity to the Pacific Fruit Express Company substation. All of the facts established that the electricity was being furnished by the Idaho Power Company jointly to the Pacific Fruit Express Company and the Railroad; they were merely co-users of energy coming from the same source.

The facts are clear and undisputed as shown in our Statement of Facts that the transmission line across the tracks to the substation, and the substation, are owned, operated and controlled by the Pacific Fruit Express Company. It is likewise clear and undisputed that when the energy left the Batiste line it was the property of the Pacific Fruit Express Company (R 341-342) ; the fact that the meter was on the 2300 volt side is not significant because the current can be metered on either side of the transformer (R 167). The Pacific Fruit Express Company agreed to pay the Railroad Company for the power it used from the Idaho Power Company plus 10% for transmission line and transformer losses (R 316).

That appellant was not furnishing or delivering energy

to the Pacific Fruit Express Company is established not only by the appellant's evidence, but also by the evidence of the appellees. First of all, the Pacific Fruit Express Company and the Oregon Short Line Railroad Company entered into a construction contract, Exhibit 26, which expired by its own terms April 28, 1929. The purpose of this contract was so that the Pacific Fruit Express Company could obtain power cheaper from the Idaho Power Company if the power it used was combined with that of the Oregon Short Line Railroad Company and the Railroad Company bill the Pacific Fruit Express Company for its portion of the power used (R 314-316). Appellees own evidence speaks louder as to this, for they put on as a witness Milton T. Sargent, Division Chief Clerk of the Idaho Power Company, and established that the Idaho Power Company furnished electricity to the Union Pacific Railroad Company, but found no billing from the Idaho Power Company to the Pacific Fruit Express Company (R 142-144). That would be natural under the co-user plan referred to, and to support this appellees introduced Exhibit No. 21 (R 210-211) in evidence, which is a bill rendered by the Union Pacific to the Pacific Fruit Express Company, and in part reads as follows:

> "For your proportion for cost of Electric Current furnished at Pocatello, Idaho, in accordance with meter reading for the month: October 22 to November 22 incl. Such current being furnished by the Idaho Power Co. is being billed for in accordance with contract Audit No. 16598 dated June 10, 1930."

Also, Earl R. Gilbert, District Foreman for the Idaho

Power Company, who testified at the trial for both parties, was asked if he would have advised his Company not to furnish power to the substation in question, and he said:

> "A. No, we would not advise them not to deliver energy because the service was always delivered to it, —at that time the substation had not been changed; it was safe at the time we started service and there was no reason why service should have been cut off" (R 238).

The Pacific Fruit Express Company was merely permitted to tap onto the railroad Batiste line (R 161) in order to obtain its power delivered by the Idaho Power. Exhibit 29, contrary to what appellees claim for it, merely enlarged the transformer site from 15x22 feet to 33x31 feet, and continue the rental for the right of the Pacific Fruit Express Company to maintain and operate the transmission line from the Batiste line across the tracks to the substation (R 336-338).

Also in support of the fact that the appellant was not delivering any energy to the Pacific Fruit Express Company it is to be observed that no claim is made, and, of course, none could be made, that the Railroad was generating any electricity. Before it could deliver any it seems to us it would have to generate it, and, of course, it was not doing that. The sum and substance is that the Idaho Power Company was delivering the energy and all the appellant did was to pay the total bill of the Railroad and Express Companys and charge the Express Company for what it used.

ARGUMENT

(Appellees Brief—p 8 to 40)

From the facts stated and set forth in detail in our opening Brief it seems clear to us that appellees have not established by any evidence or by any substantial evidence that appellant was delivering electrical energy to the Pacific Fruit Express Company. There is no evidence that appellant was operating the substation.

The substation was owned, operated and controlled by the Express Company; it held the premises under lease to the exclusion of appellant, for which reason appellant had no right, and we think no duty, to do anything about standards referred to in any of the Safety Codes. As a matter of fact, the Handbook we have H-32, which must be the same as the one appellees refer to, under Rule 91 B says:

> "The intent of the rules will be realized (1) by applying the rules in full to all new installations, reconstructions, and extensions, * * * ."

This Rule should apply in the present situation in favor of the Pacific Fruit Express Company if any of the rules are pertinent, for the substation was standard when built (R 236, 346) and was as safe on November 4, 1950 as the day it was built, with nothing defective about it. On the day of the accident, however, it was not operated safely by the Pacific Fruit Express Company (R 182-183, 203-205, 236-237, 344-345), and accordingly there was no reason to cut off service to the substation (R 238).

Appellees state it was the electrical energy which injured LaVerl Johnson. That cannot be denied, but that does not aid appellees for the reason that (1) appellant owed Johnson no duty; (2) the electrical energy going into the substation was only a condition and not the proximate cause, see pages 28, 36-44, 45-49 of appellant's opening Brief.

Appellees assert that appellant was required to exercise a high degree of care, but overlook the fact (1) that appellant was not delivering the energy, (2) that the energy belonged to the Express Company from the time it left the Batiste line to go across the tracks to the substation, both of which were owned and operated by the Express Company, (3) that the substation was not defective, was capable of receiving electrical energy, and was perfectly safe the day of the accident if it had been operated properly, but (4) the cause of the accident was the manner of operation by the Express Company.

Another thing which appellees fail to recognize is the fact that no one on the railroad (there is absolutely no proof) was advised or knew, or had any reason to know, that LaVerl Johnson, or anyone else, was to be sent into the substation on this particular day, or on any day, unaccompanied, without the most positive instructions what to do, or in the absence of positive instructions to see that the disconnect switches were pulled; none of which could be reasonably anticipated by the appellant even though it had a duty to anticipate, which we think it did not. LaVerl Johnson having been told to paint taped up leads to and from transformers, appellant could not reasonably anticipate he would pass up

the transformers and go to the rear of the substation and grab ahold of and attempt to paint a bare wire running to the lightning arrester.

No accident had ever occurred at this substation, which had been constructed for a period of about twenty-five years at the time this accident occurred. Nothing of the sort could have been reasonably expected to occur.

> "Good seamanship does not require foreknowledge of unprecedented events."
>
> *The President Madison* (9 Cir.) 91 Fed. (2d) 835, 841.

See p 23-29 of our opening Brief, and the case of

> *Charnock vs. Texas & P. R. Co.,* 194 U. S. 432, 48 L. Ed. 1057, where the court said:

> "No loss from any cause is shown to have occurred during the existence of the practice,—nothing shown from which danger could be apprehended. One of plaintiff's witnesses testified that tramps passed up and down the road daily; but what can be inferred from that? It is inappreciable. Was danger to be apprehended from their carelessness or malice? During the ten or eleven years of the existence of the station not an instance of either is shown."

Accordingly the court held there was no negligence on the part of the defendant.

This case is applicable to the repetitious contentions made by appellees that unqualified persons were allowed in the

substation. We think there was no such evidence, except on the occasion when Johnson was injured or at times when the meter was read once a month, but the man reading the meter understood his business.

Appellees endeavor to make a great deal out of the testimony that the Express Company had no electricians. Why they refuse to recognize the facts or why they ignore the facts is beyond our comprehension.

Melvin Judge testified positively (R 306-313) that he was a qualified electrician with experience in high voltage; that he started to work for the Pacific Fruit Express Company in September, 1950, and in the morning of the day the accident occurred he went to this very substation to check and change transformer oil; that he went in with James Johnson, Howard Johnson, and some Express laborers; that the pole-top switch was pulled which killed the power in the substation except that which was going into the lightning arresters; that there were just the three of them in the substation except for the laborers, who left the station first. Judge knew there was energy in the lightning arresters and so did the Johnsons. To say that the Express Company had no electricians is in utter disregard of the record, and, of course, the trial court in making the statement he did (R. 351) overlooked Mr. Judge.

One reason perhaps why appellees do not care to refer to Mr. Judge is because of the statement which their witness McClellan (R 138) made,—that the man to whom he was introduced was a railroad electrician and looked more like a

farmer than an electrician. We have never thought that a man's looks determined his qualifications or ability, and, of course, the transcript doesn't disclose his features or his face, but he was a perfect picture for the man whom McClellan stated he was introduced to as a railroad electrician.

Appellees quote from Exhibit 26, on page 21 of their Brief, which is a correct quotation, but they overlook the fact that this was the construction contract between the Express Company and the Oregon Short Line Railroad Company and terminated by its own terms April 28, 1929 (R 319).

There is no claim here, and there is no evidence, that the appellant was generating and delivering electrical energy to the Express Company, and the evidence we think definitely establishes that appellant was not delivering the power to the Express Company which was being generated, furnished, and supplied to both the Express Company and appellant by the Idaho Power Company.

On page 23 of their Brief appellees state their theory of the case, all of which we know about, but, as we have shown by the facts, appellees theory is neither supported by facts or law.

Surely the appellant has a distribution system and some substations, but the Pacific Fruit Express Company substation with which this case is concerned, and the line across the tracks to the substation is no part of appellant's so-called system. They are independent of anything to which appellees refer.

Appellant's electricians knew about the substation, and like anyone else, including laymen, knew it was dangerous

if proper precautions were not taken by those in charge. All substations are dangerous, otherwise precautions would not be taken concerning them. They are fenced; this one is. The gate is locked and only two keys to it are available, both held by the Superintendent of the Express Company.

If appellees theory is correct, then no company generating electricity and delivering electricity could ever without liability furnish electrical energy to any substation. There is always something dangerous in a substation; if it had no lightning arresters in it at all there are many other wires and apparatus that are dangerous and hazardous; otherwise they would not be kept enclosed with a fence, and locked up. For this reason the law is that unless there are known "defects" in the equipment or the substation is for some reason incapable of receiving the energy, neither of which exists in the case at Bar, there is no liability on the part of one delivering electricity to equipment owned, operated, and controlled by others, see authorities, p. 29-35 of our opening Brief.

The testimony of Earl R. Gilbert, District Foreman of the Idaho Power Company, is not and cannot be disputed, that there were no defects in the station; it was capable of receiving safely the energy being supplied "as long as the gate was locked" (R. 237) "and it was safe at the time we (Idaho Power Company) started service, and there was no reason why service should have been cut off" (R. 238).

The trouble arose and the accident occurred because those in charge of the substation and supervising LaVerl Johnson, did not pull the disconnect switches to make the place safe

(R. 237, 239). Appellees own witnesses reluctantly admit this also (R. 182-183, 203).

The substation was dangerous to those working on the transformers the morning of the day the accident occurred, but it was made safe when the switch leading to the transformers was pulled.

Everyone in charge of the Pacific Fruit Express Company knew how to deenergize the substation, with the possible exception of Shupe, who wasn't even around at the time of the accident. James E. Johnson knew, H. O. Johnson knew, and most of all, the Express Company's own electrician, Judge, knew.

Appellees theory really is that appellant is an insurer, which isn't the law. Their position would be the same if someone had been injured around the transformers because they had not been deenergized, when, as a matter of fact, both the transformers and lightning arresters were so arranged as to be capable of being deenergized and those operating the Express Company and the substation knew how that could be done and had equipment to do it (R. 286, 304, 308, 310).

The only work appellant's electricians did for the Express Company was in 1948 and 1949, and some work as shown on Exhibit 33 (R 257, 259) which was paid for by the Express Company.

Appellees cases, commencing on page 15 of their Brief, set forth the rule of high degree of care under circumstances to which the cases relate. Their cases concern defendants

engaged in the business of generating and furnishing electricity and to situations where there was something decidedly wrong with or defective about, the defendant's own facilities. Such was the situation in the Chase case referred to on page 18 of their Brief.

The Chase case certainly has no application to the case at Bar, and we think it has about ceased to be of any use or importance so far as the question of negligence is concerned. The decision was by a bare majority of the court to start with, and the Supreme Court couldn't and didn't make it applicable in *Probart vs. Idaho Power Company*, 74 Ida. 119, 258 Pac. (2d) 361, except to cite it for another proposition of law; it was definitely disregarded as applicable to the question of negligence. That the case was before the court and disregarded is apparent by the dissenting opinion of Judge Thatcher.

Appellees cases show conditions of "defects", and when the phrase is used as "defective and hazardous" it means, we think, that it was a hazard because of a defect. *Bristol Gas & Electric Company vs. Deckard* (6 Cir.) 10 Fed. (2d) 66, cited on page 32 of their Brief, and greatly relied on by them, is an illustration. This and the other cases cited merely establish that where there are known defects electricity should not be furnished until the defects are corrected. No such a situation existed in the case at Bar.

As we have shown, the facilities were safe, adequate, and sufficient to receive the power being delivered, and the facility became unsafe not because of any defect but because of

the method of operation by the Express Company, but for which no injury would have occurred.

In *Nash vs. Pennsylvania R. Co.* (6 Cir.) 60 Fed. (2d) 26, the trial court directed a verdict for defendant, which was affirmed on appeal. The court said:

> "* * * In other words, a negligent failure properly to guard machinery or plant is not a defect or unsafe condition thereof. The latter phrase therefore evidently relates to some defect or unsafety inhering in the machine or the plant, as, e.g., some break, patent or latent, in the material, some loose board or hole on the floor. * * *"
>
> (Appellees Brief p. 40-45).

Section 54-1001 Idaho Code, quoted on page 40 of appellees Brief, states that installations "from and after the taking effect of this Act," etc., shall be in substantial accord with the National Electric Code. "This Act" was first passed and approved in 1947, Chapter 251 of the 1947 Session Laws. The installations at the Express Company substation was in 1925.

As a matter of fact, there is no evidence in this case whether the substation was, or was not, in an incorporated city, so we cannot say whether the Code applies; but in any event there seems to be no contention that appellant should have done any or all of the things the Code might mention, or was required to do anything about the conditions mentioned by the witnesses Gilbert, Smith or Rising, which they determined after the accident occurred.

The remarkable thing about all of this is that neither the State Inspector Rising or Gilbert testified that they had ever told the Pacific Fruit Express Company to do anything about the substation, either before or after the accident. The witness Smith particularly made it apparent that he was thoroughly biased, and over objection was permitted to state and restate matters in an attempt to show hazards in construction; whereas Mr. Gilbert, a thoroughly qualified electrician, testified that the substation was standard when built; it came as a package job, either Westinghouse or General Electric, and at that time was the latest thing in substations; there was nothing defective about it; it was as capable of receiving energy now as when constructed; it was safe if it had been properly operated, and it was such that he, Mr. Gilbert, would not advise the Idaho Power Company to refuse to deliver service (R 236-238); and this testimony is undisputed.

How Section 61-302 Idaho Code has any connection with the appellant in this case is not clear. It might apply to the Express Company, and if so, it further establishes that the cause of the accident resulted from the acts, or omission to act, of the Express Company, and not otherwise. The same is true of anything relating to the National Electric Code.

Whether the pole-top switch should have also deenergized the lightning arresters is a theory no one thought of until after the accident occurred. There were switches to disconnect the arresters and they should have been pulled by the officers or agents of the Express Company, and everybody agrees, even the reluctant witnesses for the appellees, that if they had been

pulled the station would have been safe.

No one complains that it was hazardous to have transformers which could be deenergized by a switch, yet Smith and Rising say it was dangerous to have lightning arresters that could be deenergized by switches. Everything in the substation was dangerous unless everything was deenergized, or unless the station was properly operated. That is true of all substations.

The failure to have signs on switches to indicate whether they were open or closed had nothing whatever to do with Johnson's injury, because he never looked at any of the switches (R 228). Contrary to what appellees say, there was a hot stick available to pull the disconnect switches (R 286).

Appellees discussion herein misses the point for at least two reasons—(1) appellant was not delivering electricial energy to the substation; and (2) if it was, there was nothing wrong with doing so for there was nothing defective at the station and it was safe so long as it was properly operated (R 236-238).

This substation, we think, is comparable to an automobile or any other agency, dangerous or otherwise. If properly operated it is safe. If recovery can be had in this case then the manufacture or dealer of automobiles, or firearms, could be held liable on the theory that they had placed in the hands of people a dangerous instrumentality and should anticipate that someone would operate them or use them unsafely. Such a theory is so far-fetched that no one would consider it for a minute.

(Appellees Brief p. 45-52).

Appellees now contend it was appellant's duty to do something about the "perilous" conditions at the substation. From that it seems they are now insisting that instead of cutting off the power to the substation that the appellant should have rebuilt the substation, which, of course, is untenable.

Appellant's witness Taylor testified that Union Pacific electricians, if available, and with proper authority, would do work at the Pacific Fruit Express (R 353), but so far as this case was concerned no one was called.

We think the evidence supports only one conclusion about whether there were any railroad electricians in the substation the morning of November 4, 1950, and that is that there were none (R 303-304, 308-309). The man McClellan stated was to turn the power off was without any question Judge, the Pacific Fruit Express electrician (R 308). The only reason some of the witnesses said they saw Union Pacific electricians was because of the trucks parked in the vicinity of the substation, but what has all this got to do with the case, and how is the case affected by whether the Express Company men changed the transformer oil instead of an electrician? The Express Company's own electrician was inspecting and changing the oil on the day of the accident (R 309).

As we have shown many times, the evidence does not support a statement that appellant sold, furnished and distributed electrical energy to the Express Company, or that it maintained the installations and appliances through which

electricity was served to the Express Company substation, but under the facts and the law, what difference does that make? There was nothing defective about the station; it was serving its purpose as it had done for twenty-five years; it was safe but it was not operated safely by the owner and operator.

Appellant violated no statutes of the State of Idaho and violated no provisions of the Electrical Code. If there was any violation, and we think there wasn't, it was by the Pacific Fruit Express Company, the owner and operator of the station.

The Idaho cases commencing on page 47 of appellees Brief are cases concerning concurrent negligence. We have no negligence in this case and, of course, no concurrent negligence. Appellant owed no duty to Johnson, and appellees never proved that it did. *Chatterton vs. Pocatello Post,* 70 Ida. 480 223 Pac. (2d) 389, 20 ALR (2d) 783.

Appellant was not delivering energy in the first place, and if it was, there was nothing wrong in doing so; but in any event there was an independent intervening cause which interrupted the natural and normal sequence of events. This is not concurrent negligence. *Cole vs. German Sav. & L. Soc.,* 124 Fed. 113, 63 LRA 416. See pages 37-45 of our opening Brief; and contrary to what appellees say, a large majority of those cases are electrical energy cases.

Appellees have made only a slight effort to distinguish a few of appellant's cases; the Stearns case and the Chatterton case. They have not succeeded as to those cases; have

made no effort, and, of course, could not succeed if they had tried to distinguish the others. Particularly they pass over apparently very quickly, the most recent decision of the Idaho Supreme Court, *Splinter vs. City of Nampa,* 74 Ida. 1, 256 Pac. (2d) 215, and the one by this Court. *United States vs. Rothschild International Steve. Co.,* (9 Cir.) 183 Fed. (2d) 181. If this case should reach a point where the matter of proximate cause is to be considered these two cases alone are decisive.

In the case at Bar Johnson had a safe place to work if the premises were properly used. This situation was not caused by any breach of duty or negligence on the part of the appellant but was created entirely by the Pacific Fruit Express Company. *Austin vs. Riverside Portland Cement Co.* (Dist. Ct. App. Cal.) 271 Pac. (2d) 943, 948.

(Appellees Brief p. 53-56).

The verdict in this case is grossly excessive, and we think we fully demonstrated that in our opening Brief, p. 49-57.

Appellees appear to pass the matter off as if there is nothing to talk about, and perhaps the trial court thought so too, even though the trial court did say that it was a large verdict, but in any event, we think in the administration of justice the matter cannot and should not be so lightly considered.

If this verdict is not grossly excessive or monstrous then we think no verdict can ever be held to be so. Our analysis of what this amount of money means (p. 49-54 of our open-

ing Brief) condemns the verdict and requires that it be set aside. It certainly puts the appellee Johnson in a better financial position than if he had continued to work which we think this court condemned in the Guthrie case. That the man was severely injured and he suffered no one can or would deny, but we are dealing with rules of law and principals governing an award for compensatory damages.

If there is any case more pathetic or deserving of sympathy and pity than the facts presented in *Virginian R. Company vs. Armentrout* (4 Cir.) 166 Fed. (2d) 400, 4 A. LR. (2d) 1064, we haven't found it, yet this court in the Guthrie decision said that the Armentrout case was correctly decided, where a verdict for $160,000.00 was set aside.

Also decisive is the case of *Neil vs. Idaho & W. N. RR,* 22 Ida. 74, 125 Pac. 331, quoted from on page 50 of our opening Brief. We think the rule there laid down is also binding on this court.

Contrary to what the trial court said in its Order, and in quoting from its previous decision in *Boice vs. Bradley,* 92 Fed. Supp. 750, as to securing the right to trial by jury in civil actions, this court in *Southern Pacific vs. Guthrie,* 186 Fed. (2d) 926, stated that—

> "The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." Note 10, page. 932.

The court was discussing the power to set aside verdicts.

We hardly think it is necessary to distinguish the cases set forth on page 55 of appellees Brief. However, we refer to the Ferguson case. It is not comparable and, as a matter of fact, a later case by the Eighth Circuit Court of Appeals is *Missouri K & T R. Co. of Texas vs. Ridgeway,* 191 Fed. (2d) 363, 368, where the court cited the Ferguson case, but held a verdict of $98,800.00 to be "so excessive as to shock the conscience," and where the verdict was "for an amount fifty-five times his annual earnings for the year immediately prior to his accident." The verdict in the case at bar is sixty-two times Johnson's annual salary.

In the Kieffer case cited by appellees nothing was said by the Circuit Court of Appeals concerning the amount of the verdict.

In the Robinson case we think there is no comparison between Robinson's injuries and Johnson's. Robinson was completely wrecked, but it is difficult to follow the actions of the Florida Supreme Court in any event, for just prior to the decision in the Robinson case the court set aside a verdict for $300,000.00, *Loftin vs. Wilson* (Fla.) 67 S. (2d) 185, which case also refers to the case of *Florida Power & Light Company vs. Watson,* 50 S. (2d) 543, wherein the court set aside an award of $260,000.00 and ordered a new trial.

In the DeVito case the verdict was for $300,000.00 and reduced to $160,000.00; but in that case DeVito had 32 years life expectancy and was earning about three times as much as Johnson.

We think this court has rightly decided this matter in

favor of the appellant when in the Guthrie case it stated that the Armentrout case was correctly decided, and in *Baldwin vs. Warwick*, (9 Cir.) 213 Fed. (2d) 485, where this court held than an award of $4,500 actual damages and $50,000.-00 punitive damages for conspiracy was so grossly excessive as to make unconditional denial of Motion for New Trial an abuse of discretion.

(Appellees Brief p. 56-58).

Error as to the testimony of Elmer V. Smith.—Appellees have misconstrued or missed the point of appellant's objection to the question asked the witness Smith. We know that so-called expert witnesses are generally permitted to make statements of fact concerning matters which are technical and which might aid the jury in deciding the matter before them, but we know of no law which permits an expert witness to decide by his own conclusions the whole case, or to tell the jury what the law is.

The witness had already expressed his opinion about certain features in the substation, but we objected to him telling the jury what the law was or what the *duty* would be one furnishing electricity under the conditions to which he had referred.

It clearly is not the province of an electrical expert, or any other expert, to state what the law is or to express a conclusion as to the whole case, which is the province of the court or the jury. See pages 57-59 of our opening Brief.

(Appellees Brief p. 59-66).

Appellees, prefacing their remarks regarding instructions,

state that no appeal can be taken from an Order denying a Motion for a New Trial.

The only possible fault that can be found with appellant's Notice of Appeal is that we probably put too much in it; that is to say, after appealing from the judgment entered November 25, 1953, and the amended judgment entered August 16, 1954, we also included the Order Denying Defendant's Motion for New Trial and its Motion for Judgment NOV. The appeal from the judgment carries with it a review of all matters incident to the judgment. *Libby, McNeill & Libby, vs. Malmskold* (9 Cir.) 115 Fed. (2d) 786.

Appellees assert that appellant waived the objections it made to the Court's instructions and its objections to those requested but not given by the court.

At the outset it should be stated that objections were made pursuant to Rule 51 of the Federal Rules of Civil Procedure (R 382-387), and we don't believe that *Boise Payette Lumber Company vs. Larson,* 214 Fed. (2d) 373, is decisive.

No where in the discussion of the instructions were there any remarks, nor was there a discussion, after objections were made to the Court's Instructions objected to and set forth as Assignments of Error IV, V and VI. There was certainly no waiver of the objections to those instructions. Also the same is true with reference to objections to Appellant's Requested Instructions 1, 6 and 8 (Assignments of Error VII, VIII and X, respectively).

After the jury was recalled and further instructions given (R 386), but which did not discuss any of the objections

previously made, except possibly Appellant's Requested Instruction No. 7 (Error IX), we stated to the court that we had no *further* objections which, of course, could not be considered a waiver of any objections up to that time. Then the question came up about not tying the Pacific Fruit Express Company into this (Requested Instruction No. 7), and the court said he told the jury that any action such as their pulling the switches, etc., the Union Pacific should not be held responsible for any of their acts. This had reference to our Requested Instruction No. 7 and to no other instruction, following which it was stated that "it" is all right and that we were satisfied; meaning, of course, Requested Instruction No. 7. We think nothing else can be made out of the discussion, and while it might be held that we waived our objection to Requested Instruction No. 7 we certainly waived no other objections.

Rule 51, of course, requires objections, and these were made; they were never withdrawn, even the ones made to Requested Instruction No. 7.

It is not our understanding that a narrow or technical view is taken of objections and after objections have once been taken we think it is unnecessary to insist upon a renewal of them; it was so held in *Moreau vs. Pennsylvania R. Company* (3d Cir.) 166 Fed. (2d) 543, where the court stated that counsel must point out to the trial judge his objections, "but he is not required to indulge in reiterative insistence in order to preserve his client's rights."

See also—*Stoltz vs. United States,* (9 Cir.) 99 Fed. (2d) 283, 284.

It is not always easy or practical to labor too extensively with the court regarding the instructions, and we think in this case that we were entitled to clear instructions and that our objections were sufficient to present the matter for review.

Pierro vs. Carnegie-Illinois Steel Corp.,
(3 Cir.) 186 Fed. (2d) 75, 78;

Williams vs. Powers,
(6 Cir.) 135 Fed. (2d) 153, 156;

Sweeney vs. United Features Syndicate,
(2d Cir.) 129 Fed. (2d) 904, 906;

Thomas vs. Union Railway Company,
(6 Cir.) 216 Fed. (2d) 18.

The court's instructions were general. We asked for specific instructions on our theory of the case. There was evidence to support the requests and they should have been given. *Chicago & N. W. Ry. Co. vs. Green*, (8 Cir.) 164 Fed. (2d) 55, 61.

CONCLUSION

In closing this Brief we refer the court to our Conclusions in our opening Brief, but here we particularly summarize what we believe is vital and decisive of the case; that is to say, we sincerely believe there is no evidence of negligence on the part of the appellant. Appellant was neither delivering electrical energy to the Pacific Fruit Express Company sub-

station nor was it operating the substation. Delivery of energy to the substation, whoever was doing it, did not constitute negligence in any event. The substation was capable of receiving such power safely; there was nothing defective in or about it. It had operated satisfactorily and safely for twenty-five years, and was doing so on the date of the accident, and nothing had ever occurred to put anyone on notice that such an extraordinary set of circumstances might occur as brought about the injuries to Johnson.

The supplying of energy to the substation was only a condition in any event and not the proximate cause. The proximate cause was the failure of the Express Company to operate the station properly and as it had done for twenty-five years without incident; or the proximate cause was the failure of Johnson to do what he was told to do when he went into the substation.

There was no evidence, certainly no substantial evidence, to support appellees claim, and in any event the overwhelming evidence establishes that appellant's Motion for Directed Verdict or its Motion for Judgment NOV should have been granted. See—*State of Washington vs. United States* (9 Cir.) 214 Fed. (2d) 33, 40-41.

Respectfully submitted,

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